



# Litigation Update

Litigation Section News

March 2005

## Presumed possession of confidential information does not automatically require disqualification.

A lawyer's presumed possession of confidential information concerning a former client should not automatically cause the lawyer's former firm to be disqualified, absent evidence that persons in the firm, other than the departed lawyer, had dealings with the client or obtained confidential information. In *Goldberg v. Warner/Chappell Music, Inc.* (Cal. App. Second Dist., Div. 4; January 7, 2005) 125 Cal.App.4th 752, [23 Cal.Rptr.3d 116, 2005 DJDAR 280] the plaintiff had consulted a former partner of the firm, representing defendants, concerning her employment contract with the defendants. That partner had left the firm three years before the current litigation and there was no evidence that anyone else at the firm had any knowledge concerning the consultation or concerning any confidential information conveyed to the departed lawyer. Under those circumstances the trial court did not err in denying plaintiff's motion to disqualify the law firm from representing defendants in the litigation.

## Are California cows happy? Now we may never know.

"Great cheese comes from happy cows." But are California cows really happy? An animal rights group sued the state agency that promotes California cheese and uses the slogan in its commercials. Plaintiff claimed

that the commercials were false and misleading because California cows are *unhappy cows*. The complaint alleged that the false claims about the cows state of happiness violated California's Unfair Business Practices Act (*Bus. & Prof. Code*, § 17200 ff.). Unfortunately for the cows, the Court of Appeal ducked the issue. It held that § 17200 only applied to "persons," that a state agency is not a "person," and sustained the trial court's sustaining of a demurrer without leave to amend. *People for the Ethical Treatment of Animals v. California Milk Advisory Board* (Cal. App. First Dist., Div. 2; January 11, 2005) 125 Cal.App.4th 871, [22 Cal.Rptr.3d 900, 2005 DJDAR 355].

Thus, we may never learn the true facts about the mental health of those of our fellow mammals that reside in California's dairies. And the members of PETA will continue to worry about cows that may actually suffer from clinical depression.

**Discovery statutes will be renumbered.** The legislature has renumbered all the sections in the California Code of Civil Procedure dealing with discovery. (§§ 2016 – 2036.) The new numbering system will go into effect July 1, 2005. Because of the mid-year change, the 2005 standard codes will continue to contain the old sections, with the notation at each section that it is repealed as of July 1, 2005. The new sections, also contained in the new codes, and noted to be effective that same date, are numbered §§ 2016.010 through 2036.050.

The basic scheme was to make the discovery statutes more readable by dividing each old section into a number of smaller ones. The new statutes only renumber the sections and *do not make any substantive changes*. The new numbering scheme has remained consistent with the old one in that the first four digits of each new section number corresponds to that same section

number under the present numbering scheme but each subdivision of the present statute has been placed in a separately numbered section; e.g., present section 2016 (a) will be section 2016.010, section 2016 (b) will be section 2016.020, etc. There are a few exceptions to this numbering scheme; for example, present sections 2031.1 and 2031.2 (pertaining to elder abuse) will now be found in sections 2017.310 and 2017.320.

## Supreme Court has granted review in case limiting time for appeal from order dismissing actions based on forum nonconveniens.

In our November newsletter, we reported on *Quest International, Inc. v. Icode Corp* (Cal. App. 4th Dist., Div. 3; September 22, 2004) previously published at 122 Cal.App.4th 745, [19 Cal.Rptr.3d 173]. We warned of a trap for the unwary, because the case held that the time for appeal starts when the clerk files a minute order dismissing the action on basis of forum nonconveniens. The California Supreme Court has now granted hearing, February 2, 2005; Case No. S128935 [2005 Cal. LEXIS 1474]. Meanwhile, we suggest that, if you intend to appeal from an order dismissing your case on the basis of forum nonconveniens,

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During the month of March drop off your gently used suits at any Men's Wearhouse in California. You will receive a receipt for your donation and a 10% discount from Men's Wearhouse on your next purchase. For more information click here: [http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/2005-03-01\\_lawsuits-program.pdf](http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/2005-03-01_lawsuits-program.pdf)

## Litigation Section Events

### Annual Trial Symposium

April 15–17, 2005

Silverado Country Club and Resort  
Napa Valley, CA

See details at [www.calbar.org](http://www.calbar.org)

you continue to assume that the time to file your notice of appeal starts from the filing of the minute order.

### Does Proposition 64 affect pending cases?

Proposition 64 was passed by the California voters on November 2, 2004. It amends the Unfair Competition Law (*Bus. & Prof. Code*, §§ 17200 ff) by limiting parties who may bring suit under the statute. As before, a suit may be brought by the Attorney General, a district attorney, and, under certain conditions by a county counsel or city attorney. But private litigants may no longer bring any action unless they have “suffered injury in fact and [have] lost money or property as a result of such unfair competition.” (§ 17204.) The amendment also requires that such a litigant “complies with [*Civ. Proc.*] section 382 [the class action statute].” *Bus. & Prof. Code* § 17203.

One issue that will take some time to be resolved is whether the amendment applies to pending cases filed before the date of the election. *Californians for Disability Rights v. Mervyn's LLC*. (Cal. App. First Dist., Div. 4; February 1, 2005) [2005 DJDAR 1347] held it does not apply to pending cases. But there are many cases pending in the trial and appellate courts where this issue is being litigated and it

will probably be some time before we receive the final answer to the question from the California Supreme Court.

The Court of Appeal for the second district did hold that, whether or not the amendment applies to a pending case, any plaintiff, whether qualified under the amended language or not, has standing to appeal a dismissal of an action brought under the Unfair Competition Law. (*United Investors Life Insurance Co. v. Waddell & Reed, Inc.* (Cal. App. Second Dist., Div. 5; January 20, 2005) [2005 DJDAR 804, 2005 Cal. App. LEXIS 70].

### New and amended statutes affect litigators.

Many new statutes and amendments to existing ones effective January 1, 2005, affect our members' practices. Space does not permit us to give a comprehensive overview of these many changes. In our January newsletter we reported the new time requirements for motions and opposition papers. Here are some other changes reported by the Los Angeles Daily Journal:

- 1836 revises the procedures for the resolution of disputes between homeowners associations and their members. (*Code Civ. Proc.*, § 383.)
- 2161 revises procedures for structured settlements. (*Ins. Code*, §§ 10136 ff.)
- 2347 increases attorney fees awardable in contract actions based on book accounts. (*Civ. Code*, § 1717.5.)
- 1436 prohibits installation of “spyware.” (*Bus. & Prof. Code*, §§ 22947 ff.)
- 1457 allows recipients of unsolicited commercial e-mail to recover damages. (*Bus. & Prof. Code*, § 17529.5.)

### Parties cannot create appellate jurisdiction by stipulation.

Under the “one final judgment” rule, appellate courts lack jurisdiction to hear appeals from judgments that do not dispose of all issues between the parties to the appeal. In *Hoveida v. Scripps Health* (Cal. App. 4th Dist., Div. 1; January 6, 2005) [2005 DJDAR 1009, 2005 Cal.App. LEXIS 87] the parties sought to circumvent this rule by way of a stipulation. After the trial court had granted defendants' motion for summary adjudication with respect to a portion of the case, the parties entered into a stipulation for

judgment, dismissing the remaining claims without prejudice and with a waiver of the statute of limitation as to the dismissed claims. Thereupon plaintiff appealed. Citing *Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, [61 Cal.Rptr.2d 370; 97 DJDAR 2211] which had disapproved of a similar scheme seeking an appellate ruling from an otherwise nonappealable order, the *Hoveida* court dismissed the appeal.

### Even if erroneous, California courts must enforce judgments of courts in other states.

Ohio, like California, does not permit a default judgment to exceed the amount demanded in the pleadings. But, even where an Ohio court erred and awarded a default judgment in excess of the amount demanded in the complaint, the California court must nevertheless treat the judgment as res judicata and enforce it. *Traci & Marx Co. v. Legal Options, Inc.* (Cal. App. Second Dist., Div. 5; January 28, 2005) [2005 DJDAR 1148, 2005 Cal.App. LEXIS 110]; see also, *Silbrico Corp. v. Raanan* (1985) 170 Cal.App.3d 202, 207, [216 Cal.Rptr. 201, 204].

### Court may exclude expert opinion if foundational facts are insufficient.

*Evid. Code*, § 801 (b) spells out the foundational facts on which an expert opinion must rest. Where these facts are inadequate to support the opinion, the court may exclude the opinion. For a detailed discussion of this complex area of the law of evidence see *Lockheed Litigation Cases* (Cal. App. Second Dist., Div. 3; January 31, 2005) [2005 DJDAR 1293, 2005 Cal.App. LEXIS 130].

### Have You Completed Your Member Survey Yet?

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### Participate In The Discussion Board Excitement

See what all the excitement is about! If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board at:

<http://members.calbar.ca.gov/mb/showForum.asp?ForumID=13>

Remember to first fill out the Member Profile to get to the Discussion Board!

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